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No. 88-1484

In The

Supreme Court of the United States

October Term, 1988

STATE OF HAWAII,

Petitioner,

v.

PROKO INDUSTRIES, INC., et al.,

Respondents.

STATE OF HAWAII'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. INTRODUCTION

Petitioner State of Hawaii files this supplemental brief to bring to the Court's attention a decision of the third circuit not available at the time of petitioner's last filing. Hawaii filed its petition by mail on March 7, 1989. On the same day, the third circuit filed its decision in *In re Real Estate Title and Settlement Services Antitrust Litigation*, ___ F.2d ___, 1989 WL 18323, No. 87-1815 (3d Cir. Mar. 7, 1989). While the facts of the *Real Estate Title* decision differ in some respects from those of the instant case, the

opinion addresses many of the legal issues raised in this petition.[1]

II. ARGUMENT

In *In re Real Estate Title and Settlement Services Antitrust Litigation*, the third circuit vacated an injunction entered by a district court presiding over a class action. The injunction barred absent class members from suing the class defendants in a separate action filed in the absent class members' home state court. The absent class members were Arizona school boards, and they successfully argued that the injunction was improper because the district court lacked personal jurisdiction. The school boards did not have minimum contacts with the State in which the federal court sat. The third circuit's opinion discusses an earlier appeal in the class action by the State of Arizona, in which the third circuit rejected Arizona's argument that the district court had erred in denying its motion to opt out of the class action.

The *Real Estate Title* decision is pertinent to the instant petition because it addresses directly the arguments made by Respondent Proko Industries. Proko makes two arguments: 1) the entry of the July, 1987, order had a preclusive effect and rendered untimely the appeal

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[1] In addition to the pertinence of this decision as legal precedent, it is likely that the appellees in the *Real Estate Title* case will file a petition for certiorari. The Arizona Department of Attorney General has informed counsel for petitioner that appellees have stated their intention to file such petition with this Court.

from the March, 1988, order and 2) to disturb the supposedly final settlement is to violate the principles of "fundamental fairness."

In the *Real Estate Title* case, the appellees argued that the appeal from the injunction order was precluded because Arizona had appealed and lost an earlier order denying its motion to opt out. According to appellees, the two appeals presented the same issues, and appellants could not gain appellate review of matters which were, or could have been, raised in the first appeal. The third circuit rejected this argument, holding that "unless the title companies can establish that resolution of any of Arizona's due process claims was essential to the first panel's affirmance of the denial of Arizona's motion to opt out, issue preclusion will not bar relitigation of those issues." 1989 WL 18323, p.10, n.1. If the unsuccessful appeal of the earlier order in the *Real Estate Title* case did not preclude an appeal from the later order, then *a fortiori* in the instant case the earlier, void order – entered before Hawaii had made any appearance in the action – may not properly be held to preclude Hawaii's appeal.

Proko's second argument is that "the attempt of Hawaii to exclude itself after the deadline is contrary to the doctrines of fundamental fairness and the notion of the finality of judgments." Opp. brief at 9. This argument, too, was raised by appellees in the *Real Estate Title* case and rejected by the third circuit:

> Rather than threatening the vitality of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if

> subsequent courts find them to be inadequately represented is integral to the constitutionality of the class action procedure.
>
> * * *
>
> Far from wreaking havoc on the class action mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

1989 WL 18323, p.8.

The *Real Estate Title* case makes clear that "final" judgments are subject to later challenges to the court's jurisdiction. Proko argues that the settlement agreement entered between Proko and the class representatives is now "final and binding." Opp. brief at 3. The Settlement Agreement actually provides in Paragraph 7, "This settlement shall not become final unless and until (i) the Settlement Class is certified as to Owens-Illinois and Proko pursuant to F.R.Civ.P. 23; and (ii) this Settlement Agreement is finally judicially approved in all material respects after all appeals have been resolved and the time for appeal has expired." As far as Hawaii is aware, there has been no distribution of any of the settlement proceeds to any class member. Certainly, Hawaii itself has neither sought nor received any portion of the settlement. If Proko could actually make a proper showing that it would suffer prejudice as a result of vacating the orders purporting to bind Hawaii, the appropriate remedy is not to affirm the district court's orders but to vacate those orders insofar as they purport to bind Hawaii and remand to the district court to permit Proko to void the settlement. Both the *Real Estate Title* decision and *In re Armored Car Antitrust Litigation*, 645 F.2d 488, 494 (5th Cir. 1981), support this disposition. Proko's alleged prejudice

cannot serve to justify a district court's orders entered in excess of its jurisdiction.

III. CONCLUSION

Hawaii respectfully requests that this court grant Hawaii's petition for certiorari. The similarities between the facts of this case and those of the *Real Estate Title* case, and the contradictory holdings of the third circuit, demonstrate that the issues presented in this petition are recurring and of sufficient importance to justify granting the petition.

Respectfully submitted,

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